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September 19, 1994

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street N.W. Room 222
Washington, D.C. 20554

94-104

Re: PR File No. 94-SP2

Dear Mr. Caton:

Transmitted herewith for filing with the Commission in the above-referenced proceeding are an original and four copies of the "Opposition of the Bell Atlantic Metro Mobile Companies" to the Petition of the Arizona Corporation Commission.

Should there be any questions regarding this matter, please contact the undersigned.

Very truly yours,

John T. Scott, III

John T. Scott, III

Enclosures

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	94-104
	)	
Petition of the Arizona Corporation	)	PR File No. 94-SP2
Commission to Regulate Commercial	)	
Mobile Radio Services	)	

OPPOSITION OF THE BELL ATLANTIC METRO MOBILE COMPANIES

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TABLE OF CONTENTS

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In the Matter of	)	
	)	
Petition of the Arizona Corporation	)	PR File No. 94-SP2
Commission to Regulate Commercial	)	
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OPPOSITION OF THE BELL ATLANTIC METRO MOBILE COMPANIES

The Bell Atlantic Metro Mobile Companies (Bell Atlantic)[1], by their attorneys and pursuant to Section 20.13(c)(2) of the Commission's Rules, hereby oppose the "Petition to Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services" ("Petition") submitted on behalf of the Arizona Corporation Commission ("ACC").

I. SUMMARY

At issue in this proceeding is a state regulatory regime which imposes burdens on one class of CMRS providers but not others, and which regulates wholesale but not retail rates. The ACC requests permission to retain this scheme in its entirety. The scheme cannot, however, be squared with applicable legal

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[1] The Bell Atlantic Metro Mobile Companies operate cellular telephone systems in three Arizona markets, Phoenix, Tucson, and Arizona-5. Metro Mobile CTS of Phoenix, Inc. operates the Phoenix and Arizona 5 A-side systems, manages the Arizona-6 A-side system, and has an agreement to acquire the AZ-2 A-side system. Tucson Cellular Telephone Company operates the Tucson A-side system.

standards adopted by Congress and the FCC. In fact it either violates or fails to comply with those standards. The petition is invalid and must be denied.

The ACC's Petition is defective as a matter of law on each of six independent grounds. (1) It unlawfully requests authority to continue a regime which regulates entry as well as rates. (2) It burdens only one class of CMRS, cellular, but does not regulate competing wireless services, violating the statutory mandate of regulatory symmetry. (3) The ACC regulates only wholesale cellular rates, but not retail rates. There is no nexus between its scheme and ensuring reasonable retail CMRS rates. (4) The ACC fails to present any evidence of market conditions in Arizona, let alone that they warrant ACC intervention. The Petition thus cannot be considered because it cannot meet the statutory test for approving continued rate regulation. (5) The Petition was not lawfully adopted by the ACC. (6) It does not, as is required, identify and provide a detailed description of the specific rules the ACC seeks to maintain.

Instead of producing evidence demonstrating the need for wholesale cellular rate regulation, the ACC discusses irrelevant issues and makes incorrect claims. Its speculation that cellular service may be replacing wireless service is unsupported and fails to come close to meeting the statutory test. Its assertions that regulation is needed because there are cellular monopolies in two cellular RSAs in Arizona, and certain carriers have engaged in anticompetitive actions, are flat wrong.

The Commission's prompt denial of the Petition is both appropriate and in the public interest. The Commission need not devote its scarce resources to the Petition because it is invalid on its face.[2] The ACC seeks to maintain precisely the type of burdensome and discriminatory scheme that Congress declared must be preempted. CMRS competition in Arizona is vigorous and growing. Not only is there no need for regulatory intervention, but that intervention is burdening carriers and impeding free and even-handed competition.[3] Until the Commission acts, however, the ACC is able to maintain its regulatory regime. Accordingly, the Petition should be quickly rejected.

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[2] The defects in the ACC's Petition cannot be corrected through supplemental comments or in reply to this Opposition. Congress specifically required a petition to continue existing rate regulation to be filed by August 10, 1994, and to meet certain requirements. Since this Petition does not do so, the ACC's current rate regulation must be declared preempted. The ACC is, however, free to propose adoption of regulations through the alternative process Congress created in Section 332(c)(3)(A), in which a state can petition for authority to impose new rules.

[3] Sharon B. Megdal, Ph.D., an economist and a former Commissioner of the ACC, has reviewed CMRS market conditions in Arizona. Her affidavit is included as Appendix A to this Opposition. Based on that review, she concludes, "Continued rate regulation of wholesale cellular services in Arizona is not warranted and would be inconsistent with federal policy goals . . . . Large, experienced cellular providers are active and competing in Arizona. . . . Market forces discipline the pricing behavior of both wireline and non-wireline cellular providers." Megdal Aff. at ¶¶ 4, 11, 24.

II. CONGRESS CREATED A STRONG PRESUMPTION AGAINST STATE RATE REGULATION.

The Omnibus Budget Reconciliation Act of 1993 ("Budget Act") creates a presumption in favor of preemption of state and local rate regulation of CMRS and completely forecloses, without exception, state and local regulation of CMRS entry standards. See Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, Title VI, § 6002(b)(2)(A), 107 Stat. 393 (1993) (codified at 47 U.S.C. § 332(c)(3)). Congress found that state preemption would promote regulatory parity and "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 260 (1993). In preempting state regulation, Congress concluded that a dual regulatory regime would inhibit the development of CMRS and that it was therefore preferable to let competition in the marketplace rather than burdensome state regulation set CMRS rates.

The Budget Act allows the states to overcome this presumption against continued state regulation of CMRS rates (but not entry) under a very narrow set of circumstances. The Act permits a state to initiate or continue rate regulation if it establishes through a petition to the Commission that market conditions for CMRS in the state are not sufficient to protect CMRS subscribers from unjust and unreasonable rates or rates that are unjustly and unreasonably discriminatory. 47 U.S.C. § 332(c)(3). In the alternative, a state may justify rate regulation if

such market conditions exist and CMRS is a replacement for land line telephone exchange service for a "substantial portion" of the telephone land line exchange service within the state. Id.

In implementing this provision of the Budget Act, the Commission correctly recognized that "states must, consistent with the statute, clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers." Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, 9 FCC Rcd. 1411, 1421 (1994) ("Second Report and Order"). A state may regulate CMRS rates only if it can meet these requirements. Thus, at a minimum, a state must come forward with specific, "demonstrative evidence" of CMRS market conditions in the state, and must show by such evidence how such market conditions do not protect consumers from unjust and unreasonable rates. 47 C.F.R. § 20.13(a)(1). Moreover, if the state contends that CMRS is a replacement for land line telephone service, the state must additionally show that a "substantial portion" of subscribers have no alternative to CMRS to meet their basic telephone service needs. The state bears the burden of proof on both the statutory tests. Section 20.13(a)(5).

III. THE ACC PETITION IS DEFICIENT AS A MATTER OF LAW AND MUST BE DISMISSED.

Arizona, like any other state seeking an exemption from preemption under the Act, was required to make certain procedural and evidentiary demonstrations in its Petition. Without these demonstrations, the Commission cannot determine

whether market conditions in Arizona do not protect CMRS subscribers from unjust and unreasonable rates such that the benefits of state rate regulation rebut the presumption in favor of preemption. In this regard, the ACC Petition is deficient on its face for six separate reasons. These deficiencies make it impossible for the Commission even to address the merits of the Petition. The Commission's Rules accordingly require its dismissal.[4]

A. The ACC Unlawfully Seeks to Continue Entry Regulation.

The ACC's Petition is flawed from the first page. It there requests "authority to continue rate and entry regulation over commercial mobile service providers." Congress has preempted the states entirely from entry regulation. Section 332(c)(3). The ACC has blithely ignored the law.

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[4] The ACC claims that the Commission's process for considering state petitions is "tainted with a strong undercurrent of bias and predetermination in favor of preemption," which it believes is exemplified by the "unattainable" evidentiary hurdles required by the Commission. Petition at 21. Such preference for preemption is entirely appropriate, as that is what Congress directed. See also H.R. Rep. No. 103-111 at 261 ("In reviewing petitions ... the Commission also should be mindful of the Committee's desire to give the policies embodied in Section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee.").

In any event, Arizona had a full opportunity to participate in the development of the FCC's Rules for state petitions. Unlike other states, it chose not to do so. Even after the Commission adopted those rules in the Second Report and Order, Arizona could have sought reconsideration. Unlike other parties, the ACC again failed to do so. Its criticism of the Commission's Rules in this Petition proceeding is both improper and untimely.

This is not merely an inadvertent error. Throughout its Petition, the ACC makes clear that it demands the right to hold on to all of its existing regulatory authority, specifically including certification and other entry requirements. Petition at 7, 11-13, 17-19, 22. It does not distinguish among any of its hundreds of rules but flatly asks for permission to continue its entire "regulatory framework," including entry.[5] Id. at 5. Nor is this failure to specify the proper scope of its Petition insignificant. There is no feasible way, given the approach the ACC has taken, for the FCC to separate "rate" from "entry" regulation and evaluate only the former. Since the petition improperly seeks to continue entry regulation, it is defective and must be dismissed. Arizona can no longer impose any certification process whatsoever on parties seeking to construct or acquire CMRS facilities.

B. The ACC's Regulatory Scheme Violates Parity.

The Petition states, "Commercial mobile radio service providers licensed by the FCC and operating in Arizona currently function under a detailed regulatory structure." Petition at 2. The ACC implies that its regulation of CMRS providers is even-handed. This is in fact not the case. The ACC regulates only one type of

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[5] Arizona has not eliminated its certification process for carriers seeking to expand their services to new markets -- in the face of Section 332's clear command that such entry regulation is preempted as of August 10, 1994. For this reason, Bell Atlantic has not been able to acquire the AZ-2 non-wireline system and bring new services to that market -- despite having received the Commission's approval months ago. See Opposition at 22, infra.

CMRS service, cellular. It has deregulated other mobile services, including paging, Improved Mobile Telephone Service, and rural radio services, leaving a sharp disparity between extensive regulation of cellular on one hand and no regulation of all other wireless services.

One of the cardinal goals of Congress in rewriting Section 332 was to achieve regulatory symmetry among all services classified as CMRS. To that end, the Conference Committee directed the FCC, in considering a state petition, to "ensure that such regulation is consistent with the overall intent of this subsection as implemented by the Commission, so that, consistent with the public interest, similar services are accorded similar regulatory treatment." H. Conf. Rep. No. 103-213 at 494 (emphasis added).

The ACC's Petition neither acknowledges Congress' directive, nor explains why disparate regulation of different CMRS services is warranted. It simply ignores this critical issue. The state's scheme is precisely the sort of uneven regulatory structure that Congress wanted preempted. Because the ACC fails to justify its flatly asymmetrical regulatory scheme, its Petition must be denied.

C. Arizona's Wholesale Rate Regulation Scheme Cannot Be Authorized Under Section 332.

There is an independent reason why the Petition cannot be granted. The ACC regulates only wholesale cellular rates. It has no retail regulation. There are no tariff or other requirements imposed by the state which govern the prices that CMRS carriers are permitted to charge the public. Thus, even if retail

market conditions were such that consumers might not be fully protected against unreasonable rates, the ACC's existing regulatory scheme would not be involved. Conversely, the state scheme imposes regulation at a wholesale level -- even though competitive conditions at a retail level may be entirely adequate to protect consumers.

In short, there is no logical or rational connection between wholesale rate regulation and protection of end users. Even were there some theoretical basis that wholesale rate regulation might have some benefits for subscribers, that would not establish that such regulation is "necessary" to protect subscribers. Ms. Megdal confirms this based on her economic analysis of CMRS conditions in Arizona. She concludes that, because Arizona does not regulate retail rates, "there is no necessary connection between wholesale rates and retail rates. Regulating wholesale cellular rates does not protect end users from high rates." Megdal Aff. at ¶ 13.

Arizona's wholesale rate regulation system thus cannot satisfy the tests of Section 332(c)(3). In that section, Congress made it clear that the entire thrust of permitting states narrow authority to continue rate regulation was to deal with those unusual situations where competitive conditions did not protect consumers. It nowhere indicated any need or desire to allow states to intervene among CMRS carriers to protect resellers in particular or regulate the wholesale market in

general. Moreover, the legislative history focuses on the need to protect consumers.[6]

Assuming that there might be a situation in which wholesale rate regulation might be necessary to protect consumers, the ACC does not offer any evidence that such a situation exists in Arizona. It nowhere attempts to make, let alone prove, a nexus between its wholesale regulation and how that regulation is essential to guard end users. Again, therefore, the ACC's petition is defective.

D. The Petition Presents No Evidence of Current Market Conditions or That They Fail to Protect End Users.

Section 332(c)(1) of the Act and the Commission's Rules both require a petitioning state to present specific evidence showing that market conditions do not adequately protect CMRS subscribers from unjust and unreasonable rates or rates that are unjustly and unreasonably discriminatory. The FCC has delineated numerous examples of the types of evidence which might be relevant to this determination. In derogation of these requirements, the ACC provides no evidence at all about the Arizona CMRS marketplace, let alone meets its burden of proof.

-- There is no data on current CMRS providers. Section 20.13(a)(2)(i).

-- There is no information on customers of CMRS providers or trends in CMRS providers' customer bases. Section 20.13(a)(2)(ii).

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[6] H.R. Rep. No. 103-111 at 261 (state rate regulation may continue only where state can show "consumers are not protected from unreasonable and unjust rates"; H. Conf. Rep. No. 103-213 at 493 (using terms "subscribers" and "consumers" interchangeably).

-- There is no information on CMRS providers' rates at all, let alone "during the most recent annual period." Section 20.13(a)(2)(iii).

-- There is no analysis of the potential for new entrants for competing services or existing barriers to entry. Section 20.13(a)(2)(iv-v).

-- There is no affidavit-supported evidence of anti-competitive or discriminatory practices or behavior on the part of CMRS providers, let alone any "supported by affidavit of person with personal knowledge." Section 20.13(a)(2)(vi).

-- There is no evidence of instances of systematic unjust and unreasonable rates being imposed on subscribers. Section 20.13(a)(2)(vii).

-- There is no customer complaint data. Section 20.13(a)(2)(viii). In fact, Bell Atlantic is not aware of any complaints filed against its cellular systems in Arizona.

Rather than providing the type of evidence necessary to satisfy its burden, the ACC provides only its theory of what might occur if it does not continue to regulate CMRS rates. Nothing in Section 332 nor the Commission's implementing Rules permit the reliance by states on hypothetical market conditions to justify actual rate regulation. For example, in the section of its Petition where the ACC attempts to show that the Arizona CMRS market fails to protect subscribers from unjust and unreasonable rates, the ACC provides only supposition instead of fact. The ACC, asserting there are problems inherent to a duopoly like the cellular market, states that "the potential for monopoly abuses remains strong," and that

"[t]his problem can be compounded when other circumstances exist, such as discriminatory behavior or a policy of favoritism to the affiliated retail arm." Petition at 15 (emphasis added). But these observations are not anchored in any evidence as to conditions in Arizona, or in evidence that such behavior has in fact occurred.

Although the Commission did leave the states some discretion to submit the type of evidence that they believed would be persuasive to satisfy their burden of proof, the Commission made it clear that "states must submit evidence to justify their showings." Second Report and Order, FCC Rcd. at 1504. This Arizona has failed to do. Without evidence on market conditions and on CMRS rates, the Commission cannot evaluate whether the market conditions for CMRS in Arizona justify state rate regulation. The FCC thus need not even reach the issue of whether the ACC met its required "burden of proof." Section 20.13(a)(5). For the ACC did not even meet its burden of producing evidence which puts in issue whether market conditions in Arizona justify state rate regulation.[7]

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[7] Arizona refers to a 1989 decision in which it determined to retain regulation of cellular providers, a copy of which is attached to the Petition. That decision relied on outdated findings that cellular was a new service and was available only in Phoenix and Tucson. Since that time new competing carriers (such as Bell Atlantic) have entered the Arizona cellular market. In any event, the 1989 decision contained none of the "demonstrative evidence" that could support rate regulation under Section 332.

E. The Petition Was Not Properly Filed by the "State".

Congress expressly required that a petition to maintain regulation be filed by a "State". Section 332(c)(3)(B). While the Commission's Rules permit a state agency to file the petition, the agency must certify that it "is the duly authorized state agency responsible for the regulation of telecommunication services provided by the state." Section 20.13(a)(3). The Petition here was signed and filed not by the ACC but by a staff attorney. Nothing in the Petition demonstrates that the ACC adopted and directed the filing of the Petition. The Commission's Rules clearly do not authorize an employee of a state agency to file a petition. Were this allowed, the formalities of process which Congress wrote into Section 332 would be undermined. The Commission must, at a minimum, have reasonable assurance that the petition is the properly taken, duly authorized action of the responsible state agency. The Petition does not provide that assurance and must therefore be dismissed.

The Petition is also invalid under Section 332 because it was submitted without compliance with Arizona law. Under Arizona law, any decision of the ACC must be approved by a majority of its Commissioners in an open meeting. Arizona Revised Statutes ("A.R.S.") §§ 40-102; 38-431.05. The Arizona Open Meeting Law requires both notice of a meeting and that the meeting be open to the public. A.R.S. § 38-431.01 - .02. Although it is clearly an interested party, Bell Atlantic never received any notice of a meeting. In fact, the ACC never conducted any proceeding to consider a petition to the FCC. Because, even if the

ACC met to approve the Petition, it did so in violation of Arizona law, it is contrary to Section 332 and must be rejected.

F. The ACC Has Failed to Explain The Rules It Wants to Enforce.

To ensure that even states that are allowed to regulate CMRS rates do not impose "undue regulatory burdens," the Commission requires any state filing a petition to "identify and provide a detailed description of the specific existing or proposed rules that it would establish if we were to grant its petition." Section 20.13(a)(4).

The Commission cannot grant a state petition where the specific regulatory regime for CMRS rates is not explained in detail. Pursuant to the Act, the Commission is authorized to grant only "such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjust or unreasonably discriminatory." Section 332(c)(3)(B). Thus, the narrow exception to preemption in the Act is permitted only to the extent and for the time period necessary to protect CMRS subscribers from unjust and unreasonable rates, and the Commission must ensure that if it permits any rate regulation, it is narrowly tailored to address the market conditions in the state and does not impose undue burdens on nationwide CMRS. The Commission cannot evaluate whether a state's regulatory regime is drawn narrowly enough to serve the specific purpose of protecting consumers from unjust or unreasonable rates unless it has a full understanding of the state's proposed rules.

The Petition simply incorporates in bulk all of the constitutional and state law provisions that generally empower it to regulate all telecommunications providers. Petition at 2-8. The ACC does not explain how it regulates rates, nor does it explain why each aspect of Arizona's complex regulatory scheme meets the test of Section 332(c)(3). Without this showing, the Commission cannot begin to assess which (or indeed whether any) of the ACC's regulations would be necessary to protect consumers from unjust or unreasonable rates.

The danger of considering a deficient Petition like the ACC's is clear. Congress sought to create a uniform and nationwide regulatory regime for CMRS rates based on competition. As the Commission held, "State regulation in this context could inadvertently become a burden to the development of this competition." Second Report and Order, 9 FCC Rcd. at 1421. For example, if there is no nexus between the state's rate regulation and the underlying market conditions allegedly failing to protect CMRS subscribers, then state regulation would clearly be "unduly burdensome," and there would be no justification for allowing rate regulation to continue. The ACC's failure to delineate between precisely what rules it seeks to retain and which it now agrees to be unnecessary prevents the Commission from conducting this review. This is particularly fatal for the Petition here because it fails to demarcate ACC rate from entry regulation.

IV. THE ACC'S UNSUPPORTED ASSERTIONS FAIL TO JUSTIFY ITS REGULATORY SCHEME.

Instead of doing what Section 332 and the Commission's Rules require, and producing evidence showing the need for wholesale rate regulation, the ACC raises issues which are irrelevant to showing why regulation is needed. It claims that (1) the FCC's approval is needed to protect universal service goals, (2) wireline service is being replaced by cellular service, (3) there are cellular monopolies in two of the state's RSA's, and (4) certain cellular carriers have engaged in improper practices. But the ACC supplies no pertinent evidence to support these assertions.

A. The ACC's Current Regulatory Scheme is Not Necessary to Protect Universal Service Goals.

The ACC asserts that "FCC preemption of state rate regulation over CMRS will jeopardize the ACC's ability to insure that universal service objectives are attained." Petition at 7. This is simply wrong, both as a matter of law and of fact.

The Budget Act explicitly reserves a state's authority to impose universal service funding requirements. Where CMRS is a substitute for wireline service "for a substantial portion of the communications within the state," the state may impose requirements "necessary to ensure the universal availability of telecommunications service at affordable rates." This is true regardless of whether a state petitions to retain rate authority. Section 332(c)(3). Thus, if the statutory conditions in that provision are met, Arizona may seek, independent of the outcome of this Petition, to impose a requirement on providers to contribute to a

universal service mechanism, as long as it is applied even-handedly to the CMRS industry. That authority does not depend on continued rate regulation. In short, the ACC's current wholesale regulation is irrelevant to any universal service objectives, and cannot be authorized based on any hypothetical need to further those objectives.

B. The ACC Does Not Demonstrate That CMRS Service Has Replaced a "Substantial Portion" of Wireline Service.

Section 332(c)(3) permits a state to demonstrate that CMRS service "is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such state." A petition can be granted if the state makes this showing, and if it also shows that market conditions are not protecting consumers against unreasonable rates.

Since Arizona fails to proffer a case that market conditions are in fact inadequate, there is no need for the FCC to take up the issue of substitutability. For even if there were evidence that wireless service were a substitute for a substantial portion of subscribers, the state would not have met its burden on the market conditions prong of the statutory test. The Commission has held that, as the statute makes clear, a state relying on "substitution" must also meet the "market conditions" prong.[8]

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[8] Second Report and Order, 9 FCC Rcd. at 1505. As the Commission notes, this conclusion is supported by legislative history. Id. n. 514, H. Conf. Rep No. 103-213 at 493.

In any event, the ACC does not offer any evidence that wireline service is in fact being replaced by wireless service. It cites only the statement of a representative of U.S. West in an ACC rate proceeding. Petition at 7, n.6. If anything, the statement shows that cellular service does not serve as a replacement for otherwise unavailable wireline service. It says, "While there is little evidence today that cellular service is actually replacing traditional wireline service, clearly a portion of the usage that is now carried by cellular carriers was previously carried by landline carriers." Petition Appendix 5. This is hardly surprising since many cellular subscribers now make calls on their cellular phones that they otherwise would have made on conventional phones. For example, a businessman who previously would have called his office on a wired phone from the airport would now be making at least some of those calls from his car via a cellular phone. The statement in short simply states a truism about the industry nationwide that has nothing to do with Arizona in particular and which in fact indicates competition between cellular CMRS and certain segments of landline service.

Moreover, there is nothing to suggest that Arizona is unique in wireline telephone penetration levels. The Commission's most recent report on wireline telephone penetration shows that 94.1% of households in Arizona have telephones, above the national average of 93.9%. Between 1984 and 1993, telephone

penetration in Arizona increased at a faster rate than the national average.[9] ACC notes that 85% of Arizona residents live in metropolitan Phoenix and Tucson. Petition at 17. For CMRS subscribers in these urbanized markets, CMRS simply supplements basic telephone service. Many other Arizona communities are fully served by wireline carriers. While there are areas in Arizona where wireline service is unavailable, these are principally in the desolate, unpopulated areas due to mountainous or desert terrain or federally-owned land. In some of these areas, there are cell sites along highways which provide roaming service to travelers passing through. This is not, however, "replacement" of wireline service.

As Ms. Megdal explains, even if the ACC could identify scattered individuals who cannot obtain wireline service and thus are dependent on cellular service, "it does not automatically follow that rate regulation of wholesale cellular service is necessary to protect them from unreasonable, unjust or discriminatory rates." Megdal Aff. at ¶ 21. Discontinuing existing regulation would not subject them to such rates because end-user rates are set by market conditions at the retail level. And there is, she concludes, no nexus between wholesale rate regulation and end-user rates in Arizona. Id. In addition, a carrier would have no practical ability to identify such customers or charge them prices at variance from prices for other customers.

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[9] "Telephone Subscribership in the United States," Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, August 1994, Table 2.

In short, the ACC has not offered evidence or attempted to show that cellular service has ever replaced wireline service, let alone for the requisite "substantial portion" of the state's residents.

C. The ACC's Claims of Ineffective Competition Are Wrong.

The ACC also asserts that the CMRS market in Arizona "falls far short of effective competition." Petition at 14-15. It bases this on two observations: (1) in many markets there is only a duopoly cellular structure, and (2) in two cellular Rural Service Areas (RSA-1 and RSA-2), one of the two licensed carriers offers only roaming service. In these two markets, charges the ACC, there is "a monopoly provider of basic cellular service." Petition at 11, n.12.

As for the ACC's discussion of the duopoly structure, the fact is that the Commission has for years fostered precisely that structure based on its findings that a duopoly would most effectively benefit subscribers by promoting competition and faster buildout of systems. While the ACC may not agree with the Commission, that is beside the point. In fact, there is nothing to distinguish Arizona from any other state in this regard. Megdal Aff. at ¶ 17. Moreover, Congress was fully aware of the cellular industry's duopoly market structure when it enacted new Section 332. Yet it preempted state rate regulation, except in narrow, specialized circumstances. Clearly Congress did not intend that the existence of a duopoly, without more, would justify state regulation. Were that the case, the preemption goals of the Budget Act would be undermined. For these

reasons, the ACC's attempt to justify rate regulation on the existence of a duopoly market must be rejected. See also Megdal Aff. at ¶¶ 11, 24.

Although the ACC alludes to the potential for abuse stemming from the purported advantage of the wireline provider over the non-wireline provider, in fact, Arizona granted certification to the non-wireline provider before the wireline provider in four of six RSA's, and in a fifth, less than a month separated the issuance of certifications. Based on her review of competition in cellular service, Ms. Megdal concludes that there is no "wireline advantage" in Arizona that warrants regulation. Megdal Aff. at ¶¶ 23-24. Moreover, the wireline carrier and its telephone affiliate in Arizona cellular markets are, as in other states, subject to numerous FCC requirements specifically designed to eradicate any potential for competitive advantage, e.g., non-discriminatory interconnection obligations.

The ACC also fails to note the extensive development of other wireless services in Arizona. Appendix B to this Opposition identifies companies licensed by the FCC as of August 1994 to provide paging and SMR services to Arizona. These companies offer wireless services which can be effective competitive alternatives to cellular service. Forty-six companies are licensed to provide paging, and 78 companies to provide SMR service. Licensing information shows that there are carriers which are authorized to provide service in every cellular market and in fact in every county of Arizona.

In a footnote the ACC raises the concern that in two of Arizona's six rural service areas, AZ-1 and AZ-2, monopoly conditions might exist. In fact, there are

two carriers certified by the ACC, licensed by the FCC, and in operation in both of these markets. In AZ-1, both the A-side and B-side carriers are, moreover, competing for both local customers and for roaming traffic. While in AZ-2 only one carrier is at this time offering local service (because of the ACC's own intervention, as discussed below), both carriers are competing for roaming traffic. Numerous SMR providers are licensed in both markets, 11 in AZ-1 and 12 in AZ-2. See Appendix B. In any event, the ACC does not regulate retail rates, only wholesale rates. Thus, the existence (or lack) of retail competition cannot justify the type of regulatory scheme that Arizona now seeks to enforce.[10]

The ACC's claim also does not hold in the AZ-2 RSA. The situation in AZ-2 actually illustrates why the ACC's regulatory scheme, far from promoting competition, actually frustrates it. In June 1994, Bell Atlantic acquired authority from the FCC to acquire the A-side license for AZ-2 from the current licensee. Bell Atlantic was poised to invest substantially in that market, and was ready to aggressively compete for customers with the B-side carrier. But it has been unable to do so -- because the ACC has determined it must first proceed through

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[10] In addition, the wholesale rates in these two RSAs are similar to those in RSAs which the ACC would consider competitive. For example, a comparison of wholesale tariff rates on file with the ACC in AZ-6, where three wholesale carriers provide full service, and AZ-1, which the ACC asserts is monopolistic, undercuts the ACC's logic that markets like AZ-1 must be rate regulated. The tariffed wholesale prices in AZ-1 and AZ-2 for peak minute airtime charges range from 23 cents to 35 cents. In AZ-6, peak minute charges range from 23 cents to 40 cents. Access charges in AZ-1 and AZ-2 range from $20 to $35 per month. In AZ-6, they range from $20 to $40. Thus, the wholesale prices of carriers in AZ-1 or AZ-2, the "monopolistic" RSAs, are no higher than prices in a market the ACC would view as competitive.